

the statement of claim and in the latter it was a plaintiff's application to amend the statement of claim. The Limitation Act 1980 did not apply to either of these two cases and it will be noted that in the former case the learned judge specifically acknowledged that the Limitation Act 1980 did not apply.

In my view, these cases are not authority for the proposition that the express provision in s 31 of the Limitation Act (Cap 163, 1985 Ed) deeming any claim, and this must include a new claim brought about by an amendment to the counterclaim, to have commenced on the same date as the action in which the counterclaim is pleaded can be displaced by the exercise of discretion provided in a practice rule.

An Act of Parliament overrides a practice rule. It cannot be otherwise. This is but a self-evident proposition for which no authority is needed. I therefore rule that the learned assistant registrar, in ordering the defendant's amendment to the counterclaim to take effect from 25 October 1989, exercised a discretion he did not have.

In the event, I allow the defendant's appeal and set aside that part of the learned assistant registrar's order dated 26 June 1990 ordering para 14 of the amended defence and counterclaim to take effect from 25 October 1989. The costs of this appeal will be taxed and paid to the defendants forthwith.

Appeal allowed.

Solicitors: *Lee & Lee; Donaldson & Burkinshaw.*

Reported by *Zarinah Marican*

A **MALAYSIAN REPORTS**

Elayachee v Woo Siu Tip

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R8-11-28-90
EUSOFF CHIN J
3 JUNE 1991

Civil Procedure — Appeal to High Court — Memorandum of appeal — Time for filing — Whether appellant out of time — Subordinate Courts Rules 1980, O 49 rr 3(1), (2), (4) & 3A(3) — Rules of the High Court 1980, O 55 rr 2(1), 3 & 4(3)

C In this appeal, the magistrate's court vide notice dated 20 November 1989 notified the appellant that a certified copy of the grounds of judgment was ready for collection upon payment of a sum of money. The copy of the grounds of judgment was sent to the appellant's solicitors on 11 December 1989 and received by them on 13 December 1989. On 6 February 1990 the magistrate's court served a copy of the notes of evidence on the appellant's solicitors who received them on 7 February 1990. The memorandum of appeal was filed in the High Court on 12 March 1990 bundled together with the record of appeal. The respondent's counsel raised a preliminary objection that the memorandum of appeal was filed 20 days out of time computed from 7 February 1990. No application for extension of time was made to extend the period of 14 days.

E **Held**, dismissing the appeal:

(1) The requirement for the filing of a memorandum of appeal in the High Court and the service of a copy thereof on the respondent under O 55 r 2 of the Rules of the High Court 1980 ('RHC') is to notify the High Court and the respondent of the grounds of appeal which the appellant proposes to advance at the hearing of the appeal. It also enables the respondent to prepare his arguments to oppose those grounds, and if necessary to file a notice of cross-appeal for a variation of the lower court order, under O 55 r 3 of the RHC. The memorandum of appeal is a necessity and must be filed 14 days after the service on the appellant's solicitors, of the notes of evidence and the grounds of judgment by the subordinate courts.

G (2) The amended O 55 r 2(1) of the RHC, vide PU(A) 462/90, requires that the memorandum of appeal whether or not an appellant is represented by a solicitor, must be filed within two weeks: (i) where the appellant is represented by a solicitor, from the date of the service on him of Form 141 notifying the appellant that the notes of evidence and grounds of judgment are ready; and (ii) where the appellant is not represented by a solicitor, from the date of the service on him of Form 141 notifying the appellant that the appeal record is ready. In either case, the memorandum of appeal is to be filed separately (in Form 113A) under O 55 r 2 of the RHC.

I (3) In the present appeal the appellant is 20 days out of time when he filed his memorandum of appeal. He had not made an application supported by affidavit giving reasons why he had not, or could not, file the memorandum within the period of 14 days. Order 55 r 4(3) of the RHC states that where a memorandum of appeal is not filed within the prescribed time and no sufficient ground is shown for the delay, the appeal must be dismissed with costs. The court thus dismissed the appeal with costs.

[Bahasa Malaysia summary]

Dalam rayuan ini, mahkamah mejistret melalui notis bertarikh 20 November 1989 memberitahu perayu bahawa sesalinan alasan penghakiman yang disahkan telah siap untuk dikumpul atas bayaran sejumlah wang. Salinan alasan-alasan penghakiman telah dihantar kepada peguamcara perayu pada 13 Disember 1989. Pada 6 Februari 1990, mahkamah mejistret menyampaikan sesalinan nota keterangan kepada peguamcara perayu yang telah menerima mereka pada 7 Februari 1990. Memorandum rayuan telah difail dalam Mahkamah Tinggi pada 12 March 1990 diikat bersama dengan rekod rayuan. Peguam responden menimbulkan satu bantahan permulaan bahawa memorandum rayuan telah difail 20 hari di luar had masa yang dikira daripada 7 Februari 1990. Tidak ada permohonan dibuat bagi melanjutkan tempoh 14 hari itu.

Diputuskan, menolak rayuan itu:

(1) Keperluan bagi satu memorandum rayuan difail dalam Mahkamah Tinggi dan penyampaian sesalinannya kepada responden di bawah A 55 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') adalah untuk memberitahu Mahkamah Tinggi dan responden mengenai alasan-alasan yang bakal dikemukakan oleh perayu pada perbicaraan rayuan. Ia juga membolehkan responden menyediakan hujah-hujahnya untuk menentang alasan-alasan tersebut, dan sekiranya perlu, memfail satu notis rayuan balas bagi mengubah perintah mahkamah rendah itu, di bawah A 55 k 3 KMT. Memorandum rayuan adalah satu keperluan dan semestinya difail 14 hari selepas penyampaian atas peguamcara perayu, nota-nota keterangan dan alasan-alasan penghakiman oleh mahkamah rendah.

(2) Acara 55 k 2(1) KMT yang dipinda, melalui PU(A) 462/90, menghendaki bahawa memorandum rayuan sama ada atau tidak seseorang perayu diwakili oleh peguamcara, mestilah difail dalam tempoh dua minggu: (i) di mana perayu diwakili oleh seorang peguamcara, daripada tarikh penyampaian atasnya Borang 141 memberitahu perayu bahawa nota-nota keterangan dan alasan-alasan penghakiman telah siap; dan (ii) di mana perayu tidak diwakili oleh seorang peguamcara, daripada tarikh penyampaian atasnya Borang 141 memberitahu perayu bahawa rekod rayuan telah siap. Dalam kes yang mana satu, memorandum rayuan mestilah difail berasingan (dalam Borang 113A) di bawah A 55 k 2 KMT.

(3) Dalam rayuan ini, perayu adalah 20 hari di luar had masa apabila dia memfail memorandum rayuannya. Dia tidak membuat suatu permohonan yang disokong oleh affidavit memberi sebab-sebab mengapa dia tidak, atau tidak boleh, memfail memorandum dalam tempoh 14 hari. Acara 55 k 4(3) KMT menyatakan bahawa di mana satu memorandum rayuan tidak difail dalam tempoh masa yang dinyatakan, dan tidak ada alasan mencukupi diberi untuk kelambatannya, rayuan itu mestilah ditolak dengan kos.]

[Editorial Note: The appellant has appealed to the Supreme Court vide Civil Appeal No 04-1-91.]

Cases referred to

- 1 *Kuching Pharmacy Sdn Bhd v JI Morison Son & Jones (M) Sdn Bhd* [1990] 2 MLJ 170 (refd)
- 2 *Hj Abdul Ghani bin Kesah v Tuan Ahmad bin Tuan Man* [1990] 3 MLJ 45 (folld)

Legislation referred to

Rules of the High Court 1980 O 55 rr 2(1), 3, 4(3)
Subordinate Courts Rules 1980 O 49 rr 3(1), (2), (4), 3A(3)

A Appeal from: Summons No 82-360-86 (Magistrate's Court, Klang)

K Nadarajah (Normala with him) for the appellant.
Teh Beng Boon for the respondent.

Cur Adv Vult

B Eusoff Chin J: When this appeal against a magistrate's decision came up for hearing before me on 22 January 1991, the respondent's learned counsel raised a preliminary objection. He said that the memorandum of appeal was filed out of time, and the appeal should be dismissed.

C From the court file I noted that the magistrate court, Klang vide notice dated 20 November 1989 notified the appellant that a certified copy of the grounds of judgment was ready for collection upon payment of \$15.40.

D On 4 December 1989, the magistrate's court received from the appellant's solicitors the \$15.40, together with a deposit of \$250 under O 49 r 2(5)(b) of the Subordinate Courts Rules 1980 ('the SCR'). The grounds of judgment was sent to the appellant's solicitors on 11 December 1989 and received by the appellant's solicitors on 13 December 1989. On 6 February 1990, the magistrate's court served a copy of the notes of evidence on the appellant's solicitors. The memorandum of appeal was filed in the High Court on 12 March 1990 bundled together with the record of appeal.

E It was submitted by the respondent's learned counsel that the memorandum of appeal must be filed within 14 days after the receipt of the grounds of judgment and the notes of evidence from the magistrate's court. The memorandum of appeal was filed 20 days out of time computed from 7 February 1990. There was no application for extension of time made to extend the period of 14 days.

F Two cases were referred by counsel and they are: *Kuching Pharmacy Sdn Bhd v JI Morison Son & Jones (M) Sdn Bhd*¹ and *Hj Abdul Ghani bin Kesah v Tuan Ahmad bin Tuan Muda*.²

G In the *Kuching Pharmacy* case,¹ no memorandum of appeal was filed. It was argued there that the memorandum was not required to be filed under O 55 r 2(1) of the Rules of the High Court 1980 ('the RHC'). Haidar J held that even an appellant not represented by counsel had to file a memorandum of appeal within two weeks of the receipt of the record of appeal under O 49 r 3(2) of the SCR. Surely it would be absurd to hold that a memorandum of appeal was not required in an appeal where the appellant was represented by counsel. He held further that O 55 r 2(1) of the RHC should be read as if the words 'or within six weeks from the receipt

of the notification referred to in O 49 r 3A(3) of the Subordinate Courts Rules 1980⁷ were inserted there so that a memorandum of appeal could be submitted within six weeks after counsel for the appellant had received from the lower court the notes of evidence and the grounds of judgment.

In *Hj Abdul Ghani's* case,² the appellant's solicitor was served on 22 September 1989 a notice in Form 141 by the magistrate's court to inform him that the notes of evidence and the magistrate's grounds of decision were ready. Upon payment of the requisite fee, he was served the notes of evidence and grounds of judgment on 11 October 1989. Then on 27 October 1989 he filed the appeal record and memorandum of appeal in the High Court. He applied for extension of time of 22 days to validate the filing of both the memorandum of appeal and the record of appeal. Lamin J, after considering the *Kuching Pharmacy* case,¹ held that the memorandum of appeal must be filed within 14 days from the date of service of the notice in Form 141.

The requirement for the filing of a memorandum of appeal in the High Court and the service of a copy of it on the respondent under O 55 r 2 of the RHC is to notify the High Court and the respondent of the grounds of appeal which the appellant proposes to advance at the hearing of the appeal. It also enables the respondent to prepare his arguments to oppose those grounds, and if necessary, to file a notice of cross-appeal for a variation of the lower court order under O 55 r 3 of the RHC. Before 1 January 1991, O 55 r 2 states:

(1) The appellant shall, within fourteen days from the date of service on him of the notice referred to in Order 49, rule 3 sub-rule (2) of the Subordinate Courts Rules 1980 or within such extended time as the High Court may allow, file in the High Court in duplicate a memorandum of appeal in Form 113A.

(2) The appellant shall within the like period serve each respondent with a copy of such memorandum and a copy of the appeal record.

Order 55 r 3 of the RHC states:

A respondent to an appeal may, within seven days from the date of service on him of the memorandum of appeal, file in the High Court and serve upon the appellant a notice in Form 113B that he intends to contend on the hearing of the appeal that the decision of the Court below should be varied.

I agree with Lamin J in *Abdul Ghani's* case,² that the memorandum of appeal is a necessity and must be filed within 14 days after the service on the appellant's solicitor, of the notes of evidence and the grounds of judgment by the subordinate courts.

It is to be noted that up to 31 July 1987, the provisions of O 49 r 3 of the SCR applied to an appellant whether or not he was represented by counsel. Up to that date, all records of appeal had to be prepared by

A the subordinate courts, and when O 55 r 2 of the RHC made a reference to O 49 r 3(2) of the SCR, the requirement of filing a memorandum of appeal within 14 days as stated there, applied to all appeals to the High Court from the subordinate courts irrespective of whether or not the appellant was or was not represented by counsel.

B Order 49 r 3(1) of the SCR was then amended by PU(A) 67/88. This amendment required that the preparation of the record of appeal must be done by the subordinate courts only in an appeal where the appellant was unrepresented by counsel. PU(A) 67/88 also introduced a new rule which is O 49 r 3A which requires the appeal record to be prepared by the appellant if he is represented by counsel. When these amendments were introduced, the Rules Committee apparently overlooked to amend the provision of O 55 r 2 of the RHC so that in respect of an appeal where the appellant was represented by a counsel, the period of filing a memorandum of appeal was not fixed by the rules. This situation however, had been rectified by the Rules Committee by amending O 55 r 2(1) of the RHC vide PU(A) 462/90 so as to put the position back to normal, ie the memorandum of appeal, whether or not an appellant is represented by counsel, must be filed within two weeks:

- E
- i) where the appellant *is represented* by counsel, from the date of the service on him of Form 141 notifying the appellant that the notes of evidence and grounds of judgment are ready; and
 - ii) where the appellant *is not represented* by counsel, from the date of the service on him of Form 141 notifying the appellant that the appeal record is ready.

F An appeal record whether prepared by the subordinate courts under O 49 r 3 of the SCR or prepared by the appellant's counsel under O 49 r 3A of the SCR must contain those documents specified in the respective rules. G In either case it excludes the memorandum of appeal from forming part of the appeal record. The memorandum of appeal is to be filed separately under O 55 r 2 of the RHC.

H As regards the filing of the appeal record, where the appellant is not represented by counsel, the registrar of the subordinate courts has the duty, upon request by the appellant, to forward a copy of it to the registrar of the High Court — O 49 r 3(4) of the SCR. Where the appellant is represented by counsel, the appeal record must be filed by the appellant and he has to do it within six weeks of the service upon him of Form 141 — O 49 r 3A(3) of the SCR.

I As stated earlier, a memorandum of appeal does not form part of the appeal record. Therefore, the period of six weeks under O 49 r 3A(3) of the SCR, which applies to the filing of appeal record, cannot be applied

to the period within which to file the memorandum of appeal.

Order 55 r 2(1) of the RHC specifically deals with the memorandum of appeal. The memorandum must be in Form 113A found in the list of forms in the RHC. The memorandum must be filed in the High Court in duplicate. The period stated by this rule within which the memorandum of appeal is to be filed, is 14 days from the service of Form 141 by the subordinate courts on the appellant or his counsel. To hold that six weeks should be the period within which to file the memorandum of appeal in a case where the appellant is represented by counsel would lead to absurdity because even an unrepresented appellant is given only 14 days from the service of Form 141 to file his memorandum of appeal to the High Court.

In the appeal before me, the appellant is 20 days out of time when he filed his memorandum of appeal. He has not made an application supported by affidavit giving reasons why he had not, or could not file the memorandum within the period of 14 days after the service on him of the notes of evidence on 6 February 1990. The grounds of judgment had been served on him earlier, on 13 December 1989.

Order 55 r 4(3) of the RHC states that where a memorandum of appeal is not filed within the prescribed time, and no sufficient ground is shown for the delay, the appeal must be dismissed.

For the reasons stated, I dismissed this appeal with costs.

Appeal dismissed.

Solicitors: *Nadarajah & Partners; KC Lim & Co.*

Reported by *Wong Kim Fatt*

A Ong Lai Kim v Public Prosecutor and other appeals

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NOS 52-40-87, 52-41-87 AND 52-39-87
ZAKARIA YATIM J
30 MARCH 1991

B *Criminal Procedure — Identification parade — Use of one-way mirror*

Criminal Procedure — Sentencing — Rape — Robbery — Deterrent sentence for first offenders — Offence of violence — Occurrence of offence rampant — Public interest

C *Criminal Procedure — Sentencing — Punishment of light rotan for an adult offender — Whether appropriate — Criminal Procedure Code (FMS Cap 6), ss 173 & 288*

Evidence — Age of accused — Determination for the purpose of sentence — Age set out only in probation and charge sheet — Evidence Act 1950, s 114

D The three appellants were tried and convicted of rape and robbery. During their trial, they objected to the procedure of their identification as the parade was conducted with the victim standing behind a one-way mirror. The objection was rejected. The first appellant was sentenced to ten years' imprisonment and ten strokes of the light rotan in respect of the rape; eight years' imprisonment and four strokes of the light rotan for the robbery. The second appellant was sentenced to 15 years' imprisonment and ten strokes of whipping for the rape; eight years' imprisonment and four strokes whipping in respect of the robbery. The third appellant was sentenced to 15 years' imprisonment and ten strokes of whipping. They appealed against conviction and sentence.

Held, dismissing the appeal:

F (1) There was no specific provision in the Criminal Procedure Code ('CPC') or the Evidence Act 1950 regarding the procedure for identification parades. In the absence of such a provision, the English procedure was applicable and this allowed for the use of a one-way mirror. Therefore the use of a one-way mirror to identify the three appellants was proper.

G (2) It was also not improper for the victim to be shown pictures of suspects to see if she could identify her assailants.

(3) The sentence of ten strokes of the light rotan against the first appellant was not appropriate as he was already an adult. His age could be determined from the probation report and the charge sheet. The sentence was therefore substituted with whipping.

H (4) The sentences were not manifestly excessive. The offence of rape was rampant. The court would be failing in its duty if it did not impose a deterrent sentence in this case. The appellants are no doubt first offenders, but as they have been convicted of serious crimes involving violence, the primary consideration of the court was the element of public interest.

[Bahasa Malaysia summary]

I Tiga perayu telah menjalani perbicaraan dan disabit dengan rogol dan perompakan. Semasa perbicaraan mereka, mereka membantah kepada prosedur pengenalan mereka kerana perbarisan cam telah dikendalikan dengan mangsa berdiri di belakang sebuah cermin sehalu. bantahan telah ditolak. perayu pertama telah dihukum sepuluh tahun penjara dan sepuluh